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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

WILLIAM DAUBERT and JOYCE DAUBERT,
Individually and As Guardians Ad Litem for
JASON DAUBERT, and ANITA DE YOUNG, Individually
and As Guardian Ad Litem for ERIC SCHULLER,
Petitioners,

vs.

MERRELL DOW PHARMACEUTICALS, INC.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE THE DEFENSE RESEARCH INSTITUTE, INC. IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Defense Research Institute, Inc. (hereinafter "DRI") is a national, not-for-profit, incorporated association whose purpose is to enhance the services of the legal profession to the public, to improve the adversary system, and to work for the prompt, fair disposition of claims. DRI has a membership in excess of 18,000 trial attorneys and over 400 insurers and other corporations. DRI files an amicus brief because of the substantial public interest in matters involved in this case. The issues presented for consideration are critical in terms of their implications for the adversarial process and the fair, predictable administration of justice.

DRI's interest in this matter is twofold. First, as a trial attorneys' organization, DRI is vitally concerned with the ultimate impact this Court's ruling will have on its members. Second, and more importantly, DRI is concerned with the effect this case will have on the judicial system in the trials of civil and criminal lawsuits. Moreover, the ruling by this Court may well have a dramatic impact upon the standards of conduct with which each citizen of the United States and each member of DRI must comply.

DRI has a national, state and community-wide reputation for thorough and objective research and evaluation of legal matters. As its name implies, it functions to provide complete research and research facilities to its members. DRI files as amicus in order to provide this Court with its research and well-reasoned brief. Because of its unique position, DRI speaks for a large group of trial attorneys who are concerned with the impact of the opinion to be rendered by this Court. This Court will be aided, not only by DRI's research in this area, but also by DRI's discussion of views on the issues which this case presents.

SUMMARY OF ARGUMENT

Rules of evidence, like any other rule of law, should serve the broad societal interests of evenhanded, consistent, and predictable application of legal rules, founded upon bedrock principles rather than in the proclivities of individuals. A rule of evidence which permits expert opinions based upon tenets or techniques not generally accepted by the scientific or medical community creates unpredictability of the duties owed by one citizen to another and establishes standards of care based upon individual proclivities, rather than societal norms. Interpreting the Federal Rules of Evidence so as to require general acceptance within the scientific or medical community as a foundational prerequisite to the admissibility of expert opinions would ensure fairness, predictability, and a uniform guide against which citizens of the United States can measure their conduct. Such a standard would not discourage scientific or medical development, while adoption of a rule of evidence which has as its sole foundational prerequisite "a willingness to testify" would dramatically reduce scientific and medical development to the grave detriment of the public. The general acceptance standard would have no greater effect on the outcome of diversity cases than does any other Federal Rule of Evidence and would not significantly change the outcome of cases tried in the federal courts, as contrasted to those tried in the state courts, since the overwhelming majority of the states follow the general acceptance standard or require reasonable reliability as a foundational prerequisite to the admissibility of scientific or medical testimony.

ARGUMENT

I. FAIRNESS, PREDICTABILITY, AND FEDERAL RULE OF EVIDENCE 102 REQUIRE GENERAL ACCEPTANCE BY THE SCIENTIFIC OR MEDICAL COMMUNITY AS A FOUNDATIONAL PREREQUISITE TO THE ADMISSIBILITY OF EXPERT TESTIMONY.

A. Rules of Evidence Which Permit Expert Opinions Based Upon Tenets Or Techniques Not Generally Accepted By The Scientific Or Medical Community Create Unpredictability And Establish Standards Of Care Based Upon Individual Proclivities Rather Than Societal Norms.

Federal Rule of Evidence 102 clearly states one of the primary purposes of rules of law:

> These rules shall be construed to secure fairness ... and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

It cannot be gainsaid that any rule of law, whether substantive or a rule of evidence, in order to promote fairness, must also promote predictability. As stated in Vasquez v. Hillery, 474 US 254, 265 (1986):

> Today's decision is supported, though not compelled, by the important doctrine of stare decisis, the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society

> to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. [emphasis supplied]

This Court, again in the context of the doctrine of stare decisis, has clearly articulated predictability as a cornerstone of the law:

> The doctrine of stare decisis imposes a severe burden on the litigant who asks us to disavow one of our precedents. For that doctrine not only plays an important role in orderly adjudication; it also serves the broader societal interests in evenhanded, consistent and predictable application of legal rules.

Thomas v. Washington Gas Light Co., 448 US 261, 272 (1980) (emphasis supplied).

This Court, in determining the weighty issue before it, must address a simple question -- does the interpretation of the Federal Rules of Evidence advanced by Petitioners promote fairness, predictability and evenhanded justice? In answering that question, the Court need not debate whether Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) "survived" adoption of the Federal Rules of Evidence. Federal Rule of Evidence 102 requires construction of the rules so as to secure fairness and justice. Federal Rule of Evidence 702 permits expert testimony concerning "scientific, technical, or other specialized knowledge." Federal Rule of Evidence 703 requires the facts or data upon which an expert bases an opinion or inference be of the type "reasonably relied upon" by experts in the particular field in forming such opinions or inferences. The Federal Rules of

Evidence provide the line of demarcation: subject to the requirement that all rules of law be fair and promote predictability and evenhanded administration of justice, how should the phrases "scientific knowledge" and "reasonably relied upon by experts" be interpreted?

In determining the parameters of the Federal Rules of Evidence and the meaning to be given the phrases "scientific knowledge" and "reasonable reliability", the court must also bear in mind that resolution of such questions is not a purely philosophical pursuit. Rules of evidence have an ultimate, direct impact upon those citizens who appear before the Federal Courts -- based upon those rules, individuals lose their liberty, go free, are permitted or denied monetary recovery, or are compelled to pay vast sums of money. Thus, in a very real sense, the fundamental question before this Court will resolve a significantly broader question: to what societal norms must the citizens of the United States conform their conduct?

Against this backdrop, the Court must consider that interpretation of the Federal Rules of Evidence advanced by Petitioners. Petitioners reject an interpretation of the Rules which would require even the slightest degree of acceptance by the scientific or medical community, relying upon the language from United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985) which states:

> [G]eneral acceptance in the particular field ... should be rejected as an independent controlling standard of admissibility. Accordingly, we hold that a particular degree of acceptance of a scientific technique within the scientific community is neither a necessary nor a sufficient condition for admissibility.... [at 1237]

In turn, however, Petitioners also reject that portion of Downing

which requires the Court to independently determine basic reliability of the methodology of the expert witness. Essentially, Petitioners advance a single test for the admissibility of expert opinions -- is the expert qualified to offer the opinion? If so, all else goes to weight, not admissibility. In reality, Petitioners advance an interpretation suggested, but later rejected, by the United States Court of Appeals for the District of Columbia in Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir. 1984), where the Court stated:

> Judges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low level exposure to toxic chemicals with human disease. On questions such as these, which stand at the front of current medical and epidemiological inquiry, if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony. [emphasis supplied, at 1534]

Does such an interpretation of the Federal Rules of Evidence, when applied to the facts of either civil or criminal trials, serve the broader societal interests of evenhanded, consistent and predictable application of legal rules and ensure those rules are founded in bedrock principles rather than the proclivities of individuals? No. Rather, such a rule is based solely upon individual proclivities since, in the words of Ferebee v. Chevron Chemical Co., supra, the test for admissibility is whether the proffered expert is "willing to testify" to a given proposition, although the proposition has been rejected by the scientific community or is unproven by acceptable scientific methodology.

Such a rule of evidence, in application and in reality, has

consequence. The citizens of the United States would be left with virtually no guidelines to which they could conform their conduct. Physicians, hospitals, nurses, individual citizens and manufacturers of drugs, devices, consumer goods, or industrial products would have no guidance concerning the standards of conduct with which they must comply. Although they might comply with every known federal or state legislative or judicial requirement and although they might comply with the generally accepted body of science and medicine, they could, nevertheless, be found liable because one individual in the scientific or medical community was "willing to testify" to a given methodology or proposition, although such methodology or proposition had been uniformly rejected by the scientific community or had not gained acceptance as being reliable by the scientific or medical community because it had not yet been proven by verifiable scientific data. Thus, in a very real fashion, a rule of evidence which provides that a "particular degree of acceptance of a scientific technique within the scientific community is neither a necessary nor a sufficient condition for admissibility" creates a literal standard of care -- that standard to which a given individual is "willing to testify". Whether the testimony be offered in the utmost of good faith, scientific spirit or because substantial sums of money were paid for the particular opinion, it is beyond dispute that there is no predictability in the law when a rule of evidence will compel one to pay vast sums of money or cause one to be incarcerated because one person is "willing to testify" to a methodology or proposition. Such was the standard applied to the "witches" of Salem. Paraphrasing the words of this Court, the conduct of society would be governed by the proclivities of individuals, rather than bedrock principles and established societal norms.

B. Requiring General Acceptance Within The Scientific Community As A Foundational Prerequisite To Admissibility Is Consistent With Federal Rule Of Evidence 102 And Insures Fairness, Predictability, And A Uniform Guide Against Which Citizens Of The United States Can Measure Their Conduct

Having addressed the question of whether the interpretation advanced by Petitioners would promote fairness, uniformity and predictability, the Court should address whether the "general acceptance test" is consistent with the Federal Rules of Evidence and whether such a standard would promote fairness, predictability, and enhance the societal interest of evenhanded, consistent and predictable application of legal rules.

Federal Rule of Evidence 702 permits testimony by experts as to "scientific, technical or specialized knowledge", with Rule 703 further requiring the facts or data upon which an expert bases an opinion or inference be of a type "reasonably relied upon by experts in the particular field." In determining the meaning of those phrases, the Court must bear in mind the mandate of Rule 102, requiring construction of the rules to secure fairness and ensure justice.

Requiring general acceptance by the scientific or medical community of the methodology employed and, in some instances, of the conclusion reached, is entirely consistent with the language of the rules. "Scientific knowledge" and "reasonable reliability" should, in order to secure fairness and justice, be interpreted so as to require general acceptance. The reason for such a suggestion is simple: the sole interpretation of the Federal Rules of Evidence which will serve the societal interests of evenhanded, consistent and predictable application of legal rules, founded upon bedrock principles rather than the proclivities of individuals, is the

"general acceptance" rule. In determining a course of conduct governed by scientific or medical principles, the citizens of the United States will have a clear guide -- that which is generally accepted by the scientific or medical community. In the context of the case before this Court, the manufacturers of Bendectin, in the formulation and manufacture of Bendectin, will have an identification of that standard against which their conduct will be measured -- that generally accepted within the scientific and medical community, rather than that to which someone might be willing to testify 20 years later.

One might suggest that it is a difficult task for trial and appellate judges to determine that which is generally accepted within the scientific or medical community. Indeed, such a suggestion was made in Ferebee v. Chevron Chemical Co., supra, where the Court noted "Judges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised [in the case]." With utmost deference, the rejoinder is simple: complexity of the judicial task does not permit abdication of the judicial function. Moreover, as amply demonstrated by the record below, litigants unquestionably possess the sophistication and skill to clearly educate trial and appellate courts as to that which has gained general acceptance or general rejection in the scientific or medical communities.

It should also be noted that utilization of a general acceptance standard as a foundational prerequisite to admissibility of expert testimony will not silence those who would offer "different" opinions. Rather, it will simply require those who have "different" opinions to follow generally accepted scientific or medical methodology in reaching conclusions and will prohibit testimony from those who are "willing to testify" to propositions which have been generally rejected by the scientific or medical community or which are not scientifically

proven or provable. On the one hand, those who follow verifiable scientific methodology would be permitted to offer opinions which do not fly in the face of science. On the other hand, testimony would be prohibited from those who fail to adhere to acceptable scientific protocols. Thus, for example, those who interpret data based upon verifiable, reliable scientific methodology could offer opinions regarding cause and effect. However, citizens would not be subjected to incarceration based upon the evil of testimony that one was not telling the truth because of the results of a lie detector test, since science and medicine have found the polygraph unreliable. Similarly, product manufacturers could not be held liable based upon testimony from an expert witness who followed "generally accepted methodology" in reaching the conclusion that gravity causes objects to fall up, not down, a conclusion both rejected by the scientific community and unprovable and unproven by science.

C. The General Acceptance Standard Would Not Discourage Scientific Or Medical Development, While Adoption Of The Approach Suggested By Petitioners Would So Discourage

Some would suggest utilization of the general acceptance standard would discourage scientific or medical development. The response is simple -- courtrooms are not laboratories. While it is true that utilization of the general acceptance standard would prohibit the imposition of civil or criminal liability in the absence of application of generally accepted scientific or medical methodology or in those circumstances where science or medicine had rejected conclusions to which "one was willing to testify", it is equally untrue that such a rule of evidence would discourage scientific or medical development or research. Those who seek the cure for cancer or, indeed, those who seek to establish a cause

and effect relationship between Bendectin and birth defects, will continue to have the same encouragement which presumably induced their endeavor -- promotion of public health, welfare and safety. The Galileos, Newtons and Einsteins should and will continue their endeavors, doing so in the atmosphere of the laboratory, not the courtroom. However, until their work has risen to the level of a reasonable, predictable societal norm -- general acceptance within the scientific or medical community -- those who have relied upon and measured up to those reasonable, predictable societal norms will not be held civilly or criminally responsible for adhering to generally accepted bedrock principles rather than the proclivities of individuals which might or might not be found to be scientifically or medically accurate in the future. In short, those imprisoned because of polygraph results would have never lost their liberty.

On the other hand, science and medicine will, in great probability, be impeded if the legal standard for the admissibility of expert testimony is such that a particular degree of acceptance of scientific technique within the scientific community is neither a necessary nor sufficient condition for admissibility. If the individual and corporate citizens of the United States who manufacture goods and provide services face the potential of civil liability or criminal incarceration because "one is willing to testify", it is irrefutable that such individuals and corporations are positively discouraged from their scientific and medical endeavors. Suggestions that potential civil liability and potential payment of millions of dollars based upon "novel" science is a voluntary undertaking and a cost of doing business ignores reality and, more fundamentally, ignores a cornerstone of the law -- societal norms, not individual whims, define societal responsibility. Suggesting that the general acceptance standard should be rejected because one may be denied recovery based

upon science that may later be proven true also ignores another fundamental proposition of law -- society does not find one culpable because something is possibly true (see, e.g., opinion of District Court below, Petition For Writ of Certiorari, at page A-15). Our society has long recognized that imposition of civil liability or restriction of individual liberty must be necessarily based upon provable probability.

II. THE COURT SHOULD NOT REJECT THE GENERAL ACCEPTANCE STANDARD BECAUSE OF ITS POTENTIAL EFFECT ON THE OUTCOME OF DIVERSITY CASES

A. Most, If Not All, Of The Federal Rules Of Evidence Potentially Effect The Outcome Of Diversity Cases

Both Petitioners and Amici in support of Petitioners have suggested this Court should reject the general acceptance standard because it has the potential effect of determining the outcome of cases based upon diversity of citizenship. If this Court is prohibited from interpreting its own rules of evidence because interpretation of the rules might effect the outcome of diversity cases, this Court has no choice but to cause the repeal of all Federal Rules of Evidence. Most, if not each, of the Federal Rules of Evidence potentially effect the outcome of diversity cases. Simplistically, the rules of evidence effect the admissibility of evidence. The admissibility of evidence necessarily effects the outcome of cases. Every state in the Union has rules relating to the admissibility of hearsay evidence. Nevertheless, this Court has adopted Federal Rules of Evidence 802 through 805 relating to hearsay evidence. Many states would prohibit admissibility of witness statements as being hearsay unless those statements were made in open court or deposition with an

opportunity for cross-examination. On the other hand, pursuant to the Federal Rules of Evidence, after sufficient showing of reliability and trustworthiness, out of court statements, whether sworn or unsworn, might well be admissible. In a given case, the application of the Federal Rules of Evidence can thus easily lead to the submission of a case to a jury based upon "hearsay testimony" in circumstances where the case would not be submitted to the jury in the state court because of the hearsay rule. Accordingly, for this Court to give credence to the argument that the general acceptance standard should not be followed because of the potential effect on the outcome of diversity cases, this Court must necessarily conclude that the Federal Rules of Evidence relating to hearsay must be repealed. Similarly, the Court would need to repeal most, if not all, of the Rules of Evidence. The illogic of the position is obvious.

B. The General Acceptance Standard Would Not Significantly Impact The Outcome Of Diversity Cases Since The Overwhelming Majority Of The States Follow The General Acceptance Standard Or Require Reasonable Reliability As A Foundational Prerequisite To The Admissibility Of Expert Testimony

Suggestion has also been made that this Court should not follow the general acceptance standard because of the claimed rights of the various states to determine the outcome of cases within the confines of their state lines. While the state courts and state legislatures may possess the right to define the rules of evidence applicable to trials in the state courts, this Court possesses the sole authority to promulgate rules of evidence which are applicable to the federal courts. Indeed, one of the salutary purposes of jurisdiction based upon diversity of citizenship is to

ensure the fairness of trials between citizens of different states, thereby avoiding the potential of one state implementing rules which are unfair to citizens of other states.

Just as significantly, however, a clear pronouncement by this Court that the "general acceptance" standard prevails in the federal court would not lead to results, in the various states, which would be significantly inconsistent if the same cases were instead tried in the state courts.

Thirty states, some of which have adopted Rules of Evidence similar, if not identical, to Rules 702 and 703, have either expressly adopted the general acceptance standard or a rule of law which, in application, is comparable thereto, including: Alabama, Arizona, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Washington, West Virginia and Wyoming.[1]

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[1]Snowden v. State, 574 So2d 960 (Ala. Crim. App. 1990); State ex rel. Collins v. Superior Court, 132 Ariz. 180, 196, 644 P.2d 1266, 1282 (1982); People v. Kelly, 17 Cal. 3d 24, 29, 130 Cal. Rptr. 144, 549 P.2d 1240 (1976); Stoczynski v. Livermore, 782 P.2d 834 (Colo. App. 1989); Moore v. McNamara, 210 Conn. 16, 30, 513 A.2d 660, 667 (1986); Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982) (while rejecting the "Frye Rule", requires verifiable certainty); Wilson v. Clark, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981) (citing FRE 703) and People v. Jordan, 103 Ill.2d 192, 469 N.E.2d 569 (1984); Noblesville Casting v. Div. of TRW, Inc., 438 N.E.2d 722 (Ind. 1982) and Cornette v. State, 450 N.E.2d 498 (Ind. 1983); Smith v. Deppish, 248 Kan. 217, 236, 807 P.2d 144 (1991); Bussey v. Commonwealth, 697 S.W.2d 139 (Ky. 1985) and Commonwealth v. Rose, 725 S.W.2d 588 (Ky. 1987); State v. Deville, 524 So2d 1334 (La. App. 1st Cir. 1988), writ denied, 531 So2d 263 and American Manufacturers Mutual Ins. v. General Motors Corp., 582 So2d 943 (La. App. 2d Cir. 1991); Reed v. State, 283 Md. 374, 381, 391 A.2d 364, 367 (1978); Croall v. Mass. Bay Transp. Auth., 26 Mass. App. Ct. 975, 526 N.E.2d 1320 (1988); People v. Young, 418 Mich. 1, 340 N.W. 2d 805 (1983) and Miller v. State Farm Mut. Auto Ins. Co., 168 Mich. App. 238, 424 N.W.2d 31 (1988); State v. Oslund, 469 N.W.2d 489 (Minn. Ct. App. 1991) and State v. Anderson, 379 N.W.2d (continued)

Another seventeen states, some of which have rejected the "Frye Rule" and some of which have not addressed the issue, have adopted rules of evidence substantially similar, if not identical, to Federal Rules 702 and 703, either by legislation or common law, and presumably would give great weight to this Court's interpretation of those rules, such states including: Alaska, Arkansas, Delaware, Florida, Hawaii, Idaho, Iowa, Maine, Missouri, Montana, New Hampshire, New York, North Carolina, Oregon, South Carolina, Texas and Vermont.[2]

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70 (Minn. 1985) (requiring "broad acceptance"); Comment to Miss. R.Evid. 702, citing Frye, states that adoption of Rule 702 did not relax the general acceptance requirement, with Hardy v. Brantly, 471 So2d 358, 366 (Miss. 1985) specifically requiring general acceptance; State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990); American Elevator v. Briscoe, 93 Nev. 665, 671, 572 P.2d 534 (1977); Landrigan v. Celotex Corp., 127 N.J. 404, 417, 605 A.2d 1079 (1992) and Rubanick v. Witco Chemical Corp., 125 N.J. 421, 593 A.2d 733 (1991); State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961) and State ex rel. Human Services Dep't v. Coleman, 104 N.M. 500, 723 P.2d 971 (N.M. Ct. App. 1986); Stein v. Ohlhauser, 211 N.W.2d 737, 743 (N.D. 1973); Smith v. State, 656 P.2d 277 (Okl. Crim. App. 1982) and Robinson v. State, 677 P.2d 1080 (Okl. Crim. App. 1984), cert. denied 467 US 1246 (1984); Commonwealth v. Topa, 471 Pa. 223, 369 A.2d 1277 (1977); Powers v. Carvalho, 281 A.2d 298, 304 (R.I. 1971); State v. Dirk, 364 N.W.2d 117, 120-21 (S.D. 1985); Tenn. R.Evid. 703 and State v. Williams, 657 S.W.2d 405 (Tenn. 1983); Kofford v. Flora, 744 P.2d 1343, 1346 (Utah 1987) (requiring general acceptance or "inherent reliability"); State v. Lord, 117 Wn2d 829, 850, 822 P.2d 177 (1991); W.Va. R.Evid. 702 and 403 and State v. Woodall, 385 S.E.2d 253, 259 (W. Va. 1989); Buhrle v. State, 627 P.2d 1374, 1377-78 (Wyo. 1981) (requiring that pertinent "state of the art" support the opinion).

[2]Alaska R.Evid.; Ark. R.Evid. and Prather v. State, 307 Ark. 180, 820 S.W.2d 429 (1991); Del. R.Evid.; Fla. Evid. Code § 90.403 requirement of "probative value" and cases defining same, Kruse v. State, 483 So2d 1383 (Fla. 4th DCA 1986); Hawaii R.Evid.; Idaho R.Evid.; State v. Hall, 297 N.W.2d 80, 84-85 (Ia. 1980), cert. denied, 450 US 927 (1981) and State v. Nelson, 480 N.W.2d 900 (Ia. App. 1991); Maine R.Evid.; R.S.Mo. § 490.065 (1989); Mont. R.Evid.; N.Hamp. R.Evid.; Holshek v. Stokes, 505 N.Y. S.2d 664, 122 A.D.2d 777 (1986) and Hambsch v. New York City Transit Authority, 63 N.Y.2d 723, 469 N.E.2d 516 (1984) (incorporating requirements of FRE 703 by common law); N.Carol. Gen. Stat. § 8C-1; Oreg. R.Evid. (ORS 40.415); Howell v. PYA-Monarch, Inc., 344 S.E.2d 157 (S.C. Ct. App. 1986) and Campbell v. Parchal, 347 S.E.2d (continued)

Only three states, Ohio, Virginia and Wisconsin, follow the rule that the foundational prerequisite for expert opinions is that "one is willing to testify."[3]

Thus, notwithstanding contrary suggestions, the general acceptance standard, if followed by the federal courts, would not significantly effect the outcome of the same cases tried in the state courts since thirty states have adopted a rule identical or comparable to the general acceptance standard, thirty-five to thirty-eight states follow rules identical or similar to Rules 702 and 703, with only three states following the approach suggested by Petitioners.

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892 (S.C. Ct. App. 1986) (adopting language of FRE 703 by common law); Tx. R.Evid and Texas Farm Bureau Mutual Ins. Co. v. Baker, 596 S.W.2d 639 (Tex. Civ. App. - Tyler 1980); Vermont R.Evid.

Amicus has not attempted to numerically quantify those states which have both accepted the "general acceptance standard" and adopted Rules comparable to 702 and 703, nor has Amicus attempted to numerically quantify those states which have rejected the "general acceptance standard", while adopting Rules comparable to 702 and 703. However, it is significant to note, without regard to whether the general acceptance standard has been accepted or rejected by those states, according to Judge Weinstein and Professor Berger, at least 28 states have adopted Rule 702 without change, at least six states have adopted Rule 702 with minor changes, at least 26 states have adopted Rule 703 without change, and another eleven states have adopted Rule 703 with minor changes. 3 Weinstein's Evidence, 702-64 thru 95 and 703-40 thru 57. Since the date of the last supplementation to the work of Weinstein and Berger, Missouri (and possibly other states) has been added to the count of those states which have adopted Rules essentially identical to Rules 702 and 703. R.S.Mo. § 490.065 et seq. Thus, 35 states have adopted Rules which are identical or substantially identical to Rule 702 and 38 states have adopted Rules which are identical or substantially similar to Rule 703.

[3]State v. Pierce, 61 Ohio St. 3d 190, 597 N.E.2d 107 (1992); O'Dell v. Commonwealth, 234 Va. 672, 695-96, 364 S.E.2d 491, 504 (1988); State v. Walstad, 119 Wis. 2d 483, 515-19, 351 N.W.2d 469, 485-87 (1984).

CONCLUSION

Rules of evidence, like any other rule of law, should serve the broad societal interests of evenhanded, consistent, and predictable application of legal rules, founded upon bedrock principles rather than in the proclivities of individuals. A rule of evidence which permits expert opinions based upon tenets or techniques not generally accepted by the scientific or medical community creates unpredictability of the duties owed by one citizen to another and establishes standards of care based upon individual proclivities, rather than societal norms. Interpreting the Federal Rules of Evidence so as to require general acceptance within the scientific or medical community as a foundational prerequisite to the admissibility of expert opinions would ensure fairness, predictability, and a uniform guide against which citizens of the United States can measure their conduct. Such a standard would not discourage scientific or medical development, while adoption of a rule of evidence which has as its sole foundational prerequisite "a willingness to testify" would dramatically reduce scientific and medical development to the grave detriment of the public. The general acceptance standard would have no greater effect on the outcome of diversity cases than does any other Federal Rule of Evidence and would not significantly change the outcome of cases tried in the federal courts, as contrasted to those tried in the state courts, since the overwhelming majority of the states follow the general acceptance standard or require reasonable reliability as a foundational prerequisite to the admissibility of scientific or medical testimony.

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